Chartered Institute of Taxation
Excellence in Taxation

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

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PAPER 3.02 – EU VAT OPTION

Suggested Solutions

PART A

Question 1

Part 1

Before the change to arrangements, Handel's sales to EU business customers would have been zero rated, subject to Handel retaining proof that the goods have left Germany, obtaining the customer's VAT registration details and completing EC Sales lists and possibly Intrastat declarations. However, following the change, the transfer of goods forming call-off stocks in Austria and Poland be will normally be a cross-border movement of own goods requiring a VAT registration in those countries to allow the transfer to be zero-rated and the acquisition tax accounted for. This is the position unless Austria and Poland operate a simplification procedure for call-off stock that allows the goods to be removed to those member states with Handel using the customer's VAT registration numbers to account for the movements and the customers accounting for acquisition tax. This arrangement would save Handel from registering in each of the 2 member states. It should be noted that not all member states have adopted the simplified treatment for call-off stocks and students who acknowledge this in their answers will not awarded extra marks

Part 2

Sales of software downloads by Joyce Ltd to business customers will be reverse-charge supplies where the customer accounts for VAT in their local country. From 1 January 2015, for sales to non-taxable customers Joyce Ltd will have been required to register in each non-taxable customer's member state or use the Mini One Stop Shop (MOSS) arrangements to account for VAT in the customer's country as the supplies fall within the Telecom, Broadcasting and Electronic (TBES) services covered by Art 58 PVD. Following the change, VAT on sales to business customers by Gaudi S.p.a will be dealt with under the reverse charge but to account for VAT on sales to non-taxable persons Gaudi S.p.a will need to register in each of its non-taxable customer's member states or register for MOSS in Italy, there will therefore be 2 potential MOSS registrations, one for each company.

Part 3

Charges from an EU head office to EU branches are not regarded as supplies under the principles established in FCE Bank (C-201/04) and no supply was considered to exist. Whilst the Court in that case did not express a view on the situation of a head office established outside the EU (as here) it is widely thought that a similar treatment would apply i.e. there was no supply. However, following a reference from Sweden to the CJEU, in Skandia (C-7/13), the CJEU determined that where the recipient branch is VAT grouped in its member state it becomes a taxable person separate from the head office which meant that a supply exists and a reverse charge will usually apply. The position regarding VAT grouping differs across the EU and this ruling has led to practical difficulties in its application. In the present circumstances the Swedish branch would be expected to apply a reverse charge and the non-VAT grouped branches would not be treated as having received any supply.

Part 4

Advertising services made from outside the EU to a customer who is also outside the EU are not subject to VAT. Even though in this case 90% of the services are used within the EU and would normally be expected to be subject to a reverse charge, the use and enjoyment provisions do not currently apply to advertising services, although this is a position on which the EU may require future changes. No EU VAT will therefore be due. Subject to the specific facts, it could be argued that the supplies are provided to fixed establishments (branches) of the Australian company in the EU and they would be required to account for a VAT reverse charge.

Part 5

Elgar, the group's insurance company would be exempt from VAT and unable to recover VAT charged to it by third party repairers. After the change the intra-VAT group repair charge would be disregarded. However, Britten, the purchaser of goods and services used to make repairs would be unable to recover VAT through the group registration as there would be a direct and immediate link to the group's exempt supplies made by Elgar.

Part 6

Advertising services supplied to Britten Ltd would arguably relate to exempt supplies made by the Elgar VAT group and the resultant reverse charge on the supply by the Channel Islands company would result in irrecoverable VAT incurred by the VAT group of which Elgar and Britten are members.

Question 2

Architectural services are included within the description of services connected with immovable property in Art 47 PVD, for which the place of supply is determined by where the property is located.

Part 1

The place in which the land is located is Lisbon and this will determine where the supply is made and is likely to require registration for VAT in Portugal. The fact that the customer is established in the Netherlands is not relevant in a case where land services relate to a specific location even though it would normally be for the majority of B2B cross border supplies.

Part 2

The design services relate to a specific site and neither the status of the customer or the type of building are very relevant when determining the PoS, although arguably design services are less readily identified as "services related to land". In this case the PoS is Germany.

Part 3

The location of the actual land upon which the hotels may be constructed is unclear although the suggestion of a non EU location exists. In this case the lack of a link to a specific site means this is not a land related service and the service falls within the basic rule and would be supplied in Hungary where the recipient is established. The supply from the UK would therefore not be subject to UK VAT and the client would account for any VAT under the reverse charge.

Part 4

The location of the land in this case is clearly Greece. Architects must register for VAT in Greece and charge Greek VAT providing the services offered fall within Art 31a(2) (q) Implementing Regs. It is possible that the supply could fall outside this provision in which case the UK supplier would charge UK VAT on a B2C supply under Article 45 PVD.

Part 5

Market research and consultancy is not generally regarded as a land related service and the location of land in Austria is not relevant. As the customer (UK subsidiary) is established in the UK – the same member state as the supplier – UK VAT should be chargeable. The only exception to this would be if the UK subsidiary had a fixed establishment in Austria which was using the supply for its own business purposes in such a case the UK partnership would not be required to charge UK VAT and the Austrian fixed establishment would be required to apply the reverse charge if registered.

Part 6

The issue of new share capital was determined in Kretztechnik AG (C-465/03) not to be a supply. In the current case there is no supply and so the place of supply point does not arise.

VAT grouping – The possibility of a VAT group (single taxable person) being formed by a partnership and a corporate body which it controls is envisaged within Art 11 PVD which allows bodies with financial, economic and organisational links to be considered a single taxable person. This point was the subject of the CJEU judgments in Larentia & Minerva and Marenave (CJEU C-108/14 and C-109/14) which highlighted the opportunity for member states to allow such VAT groupings although the court did not consider that businesses had a directly enforceable right to form such groups in member states which had not implemented the provision in domestic law. The UK and Germany are amongst such states and the position across the EU is subject to review in the light of these findings. The advice should acknowledge one or both of these cases and state that at the current time a group cannot be formed although this should be kept under review.

PART B

Question 3

Part 1

Missing trader (MTIC) fraud has been estimated to cost the EU €100 billion per year (Europol report 2014).

Two of the most common MTIC themes are Acquisition fraud – where a business in member state B acquires goods from member state A without a VAT charge and then sells those goods charging VAT but not passing it to the tax authority. Another variation is Carousel fraud, where goods or services are acquired without VAT from one member state, with the acquirer then charging VAT but going missing without accounting for the VAT due on the onward supply. However, the goods are then sold through a series of other companies before being dispatched, prompting a VAT repayment to the /dispatcher, and then re-acquired in member state B in order for the fraud to be repeated, often many times.

Part 2

The EU Commission, Court and Parliament have provided member states with a range of powers with which to prevent and discourage opportunities for cross border VAT fraud.

The range of powers includes the following:

Refusal of VAT registration

Without a VAT registration it is impossible to recover VAT or to legitimately obtain goods from a supplier in a different EU member state without being charged VAT. When considering applications tax authorities pay attention to the proposed commodities and supply chains that applicants say they will be trading in and give greater scrutiny to requests that may be associated with individuals, commodities or locations that have previously been suspect of MTIC fraud.

EC Sales list reporting

The requirement to obtain and provide customer details for all cross-border sales of goods and taxable services which have been zero-rated or treated as outside the scope of VAT is an essential basic information source to enable member states to identify purchasers of goods within each recipient's member state by whom further taxable supplies are expected to be made. They also allow verification of claimed zero rated exports of goods and services particularly where accompanied by VAT repayment claims.

Information exchange

In addition to information exchange based on EC Sales Lists (VIES system), Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax allows for spontaneous exchange of information between member states where large amounts of tax is suspected to be at risk. Passing information in real-time gives tax authorities improved prospects of taking early action to verify transport movements of goods and the claimed tax treatment. The Eurofisc unit in Paris is specifically tasked to exchange information to combat MTIC fraud and is staffed by representatives from each member state.

Multi-lateral controls and EU audit teams (Fiscalis)

High value/volume exporters are considered for cross EU programs of control as part of co-ordinated activities agreed between 2 or more member states. The purpose of these multi-lateral exercises is to ensure that all reporting requirements are being correctly applied and that tax leakage is not resulting at any stage of the movement of goods or charging of services.

Extension to reverse charge

Member states have been provided with the ability under derogation (Art 395) and Art 199 PVD to implement, until 2018, legislation to replace the normal VAT charge by a supplier in a domestic sale with the liability to account for VAT by the customer, in a way that is similar to the conventional reverse charge procedure. The effect is to prevent the supplier from charging VAT and therefore denying them the opportunity to retain any VAT without paying it to the VAT authorities. Commodities that have been included within the scope of such legislation include computer chips, mobile phones, laptops, goods subject to excise duty, gas and electric, raw foodstuffs, metals, Carbon emissions trading, energy trading, supplies of staff and wholesale telecoms supplies.

<u>Joint and Several liability in supply chains</u>

In addition to reverse charge restrictions, member states have introduced legislation which allows them to be able to challenge the ability to recover input tax from purchasers who have known, or should have known, the transaction was part of a fraudulent supply chain. This led to the CJEU cases Bond House Systems Ltd (C-484/03), Optigen (C- 354/03), Kittel (C- 439/04) and Recolta Recycling (C-440/04) in which “innocent” traders involved in fraudulent supply chains were denied the right to deduct VAT. The CJEU ruled that only traders who took every precaution reasonably required of them to ensure their transactions were not connected with fraud may rely upon the right to deduct.

<u>Restriction on right to deduct</u>

Many member states have attempted to restrict recovery on VAT on suspect transactions by holding that invoices and other supporting documentation was inadequate to allow recovery. ECJ cases Petroma Transports and Others (C-271/12), Bonik (C- 285/11), Maks Pen (C- 18/13) and others.

<u>Quick Reaction Mechanism</u>

The QRM was approved by the EU Council on 22 July 2013 and allows member states to introduce measures, such as compulsory reverse charge treatment, in relation to specified commodities and services, which only provides the Commission, and other member states, with a short period to confirm whether it objects. The QRM is designed to allow states to quickly react to “sudden and massive fraud “ by making immediate changes to the VAT treatment of specific supplies, acquisitions and imports.

<u>Derogations</u>

Member states have implemented a range of restrictions based on commodities and supplies which they have individually experience fraud/tax loss. Some of these have expired and been rejected for renewal. Commodities include timber, Insolvency procedures and raw food.

PART C

Question 4

Director
Hillheim Institute
Dusseldorf

An Advisor
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14th June 2016

Dear Director,

In response to your enquiry, I am pleased to provide an overview of the features that are important when determining the place of belonging of a non-taxable person.

The place of belonging is important for the purposes of determining the VAT liability of those services which are dependent on the location of the customer. This will be where he has his permanent address or usually resides. These aspects are defined in Articles 12 and 13 Implementing Regulations (IR 282/2011) which state that the permanent address of a natural person shall be the address entered in the population or similar register, or the address indicated by that person to the relevant tax authorities (unless there is evidence that this address does not reflect reality). The place where a natural person “usually resides” is the place where that natural person usually lives as a result of personal and occupational ties. Where the occupational ties are in a country different from that of the personal ties, or where no occupational ties exist, the place of usual residence shall be determined by personal ties which show close links between the natural person and a place where he is living.

The correct determination of the place where a person has his permanent address or usually resides is important in the following scenarios (not exhaustive):

1. A supply of services to a non-taxable person who belongs outside the EU - the identification of the customer’s permanent address or usual residence outside the EU is essential for the supplier to determine whether VAT is chargeable or not (Art 59 PVD).

2. Telecommunication, Broadcasting and Electronic services (TBES) are supplied where the non-taxable customer has his permanent address or usually resides, this needs to be determined because the supplier will need to account for VAT to the customer’s Member State at the applicable rate (Art 58 PVD).

3. Eligibility to purchase goods VAT free for export is only allowed for travellers not established within the Community (or those intending to depart from the EU). Suppliers need to identify the permanent address or habitual residence of potential purchasers (Art 147 PVD).

4. The place of supply of hiring a means of transport (other than pleasure boats), for longer than 30 days (vessels 90 days), is where the non-taxable customer has his permanent address or usually resides belongs (Art 56 PVD). This can potentially require a business to register in the member state of their customer where they otherwise have no connection with that member state.

I trust this is helpful and would be pleased to provide any further information if required.

Yours faithfully,

An Advisor

Question 5

Derogations can be made under the following four broad headings:

Continuation of treatments applied by member states at 1 January 1978 (Articles 370 to 374)

Arts 370 to 374 allow member states which taxed or exempted transactions or applied provisions derogating from principles relating to the right to deduct and agency in Arts 179, 28 and 79, that existed at 1 January 1978, to continue with those tax treatments.

Measures granted to member states that acceded to the EU after 1 January 1978 (Articles 375 to 390(b))

Arts 375 to 390b permit specified member states, which acceded to the EU after 1 January 1978, to retain former tax treatments on particular activities until specified future dates.

Article 391 provides the opportunity for member states to allow taxable persons the right to opt for taxation of transactions covered in some of the Arts 371 to 390b which allowed for exemption.

The existence of the Art 370 to 390b derogations are kept under review by the EU Commission with a view to facilitating the transition to definitive arrangements. (Art 393).

The EU Commission website publishes a list of all Derogations in force under the various headings. Member states are not obliged to apply the Derogations for which they have received authorisation.

Special measures that were applied by member states before 1 January 1977 and notified to the Commission before 1 January 1978 (Article 394)

In addition to any general derogations allowed under Articles 370-374, member states may be allowed to retain special measures, in existence at 1 January 1977, to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. These are provided that they have notified the Commission accordingly before 1 January 1978 and that such simplification measures comply with the criterion laid down in the second subparagraph of Article 395(1) – not to affect the VAT collected on final consumption except to a negligible extent.

Decisions authorised by the Council under the procedure provided for in Article 395

Article 395 PVD allows member states to derogate from the Directive’s provisions to simplify the procedure for collecting VAT or preventing certain types of evasion or avoidance.

Derogations authorised under Art 395 intending to simplify the procedure for the collection of VAT may not, except to a negligible extent, affect the overall amount of tax revenue of the member state collected at the stage of final consumption.

A member state wishing to introduce a measure covered by Art 395 is required to send an application to the European Commission and provide all necessary information. Once the Commission has all the necessary information it has one month to notify the requesting member state accordingly and to send the request to the other member states. Within three months of giving the notification, the Commission shall present to the Council an appropriate proposal or where appropriate a communication setting out its objections to the derogation request.

The whole procedure detailed in Art 395 should be completed within eight months of the receipt of the application by the Commission, although this is shortened to six months in cases of imperative urgency, covered under Art 199b “Quick Response Mechanism” special measure to combat sudden and massive fraud e.g. measures to tackle MTIC fraud.

On 24 July 2006 the Council agreed a Directive 2006/69, giving all member states the option of applying special rules to simplify the application of VAT or to counter tax avoidance and evasion. The effect of this was to allow member states and the Council to apply special rules without seeking individual authorisations or periodic renewals. The special rules that apply, for example, to the taxation of investment gold and the Capital Goods scheme. Member states adopting provisions that do not require notification or authorisation by the Commission as derogations are nevertheless required to inform the Commission of the text of those provisions.

Question 6

The CJEU decision in Fiscale Eenheid X C-595/13 concerned matters referred from the Dutch courts, these were i) whether an investment fund, which invests entirely in real estate, can be regarded as a "special investment fund" within the meaning of Art 135(1)(g) PVD, and ii) if yes, what services could be regarded as management services and in particular whether the actual management of property assets within the fund could be regarded as "management of a special investment fund". The Court confirmed that the actual nature of the underlying investment assets within the fund was irrelevant. The judgment limited exempt management services to administrative and accounting services and the selection, purchase, and sale of the properties, but excluded the actual management of the properties, including letting, tenant management and maintenance from the exemption. In doing so it did not disturb the taxable treatment and place of supply of services closely connected with immovable property.

The fact that the PVD states that regulation of a SIF is dependent on national legislation only allows member states to define funds regarded as SIFs and not select which of them are within or out with the exemption.

Other recent judgments that have been concerned with the interpretation of Art 135 (1) (g) Dir 2006/112, (and its predecessor Art 13B (d) (6) Dir 77/388), include:

Abbey National (C-169/04) which determined that the concept of 'management of special investment funds' referred to in that provision covered the services performed by a third-party manager in respect of the administrative management of the funds, if, viewed broadly, they form a distinct whole, and are specific to, and essential for, the management of those funds.

Morgan Fleming Claverhouse (C-363/05) (Claverhouse) in which the Court regarded the term 'special investment fund' as capable of including closed-ended investment funds, such as investment trust companies (ITCs) and ruled that Member States have a discretion to define 'special investment funds' for the VAT exemption but, in doing so, must pay due regard to:

- the purpose of the exemption; and
- the principle of fiscal neutrality

According to the Court, the purpose of the exemption is to facilitate investment in securities for investors through investment undertakings. This requires there to be VAT neutrality between the direct investment in securities and investment through collective investment undertakings, as the latter incurs a management charge. Furthermore, there must be equality of VAT treatment for funds which are similar to, and in competition with, funds falling within the scope of the exemption such as those covered by the UCITS Directive (this sets out common EU rules for the regulation of 'Undertakings for Collective Investment in Transferable Securities').

ATP (C-464/12) – in which for a defined contribution pension scheme it was held that management services were exempt,

In contrast, in Wheels (C-424/11) – the terms for exemption were not met in a defined benefit pension scheme as the court ruled there was insufficient connection between investors and the investment return because the employee knew what the pension payable would be irrespective of investment performance.

Also PPG (C26/12) – which was primarily concerned with whether an employer was entitled to recover VAT on costs incurred in providing a defined benefit pension scheme under a legal obligation. The court found for the employer, but was also asked to consider, as a second question, whether the pension fund could be regarded as a SIF. It declined to do so as this point had already been addressed in the Court's decision in Wheels.

Overall the scope of management services to SIFs falling within the exemption has been broadly drawn but does not include the management of property or applied where investment risk is not borne by investors.

Question 7

VAT Committee

The VAT Committee is an advisory committee on VAT set up under the provisions of Article 398 Dir. 2006/112. The committee consists of representatives of all Member States and of the Commission, with the chairman being a representative of the Commission.

The VAT Committee adopts its own rules and procedures and although it cannot take legally binding decisions it can provide guidance on the application of the Directive.

Some of the provisions of the PVD require member states to consult the VAT Committee before making use of options provided to them in the Directive. An example of this is Art 177 which requires member states to consult the Committee before introducing changes to restrict the right of deduction of input tax on goods. Not all provisions of the PVD require prior consultation of the Committee, some only require notification after national legislation has been put in place – these are published as Notifications.

The VAT Committee also examines questions concerning the application of EU VAT provisions raised, on its own initiative, by Member States or its own Chairman. As a result the Committee may issue guidelines on specific matters, although these only constitute views and are not legally binding on member states who are free not to follow them. The guidelines provided by the Committee are approved unanimously (28 members), almost unanimously (24-27 members) or by a large majority (19-23 members).

In a commitment to transparency, the guidelines resulting from the meetings of the Committee are published on the Commission website.

Some guidelines agreed by the Committee have been transformed into binding implementation measures following unanimous acceptance by the Council of a proposal by the Commission to adopt proposals. The latest version of these is Council Implementing Regulation 282/2011, as amended, which is directly applicable upon member states.

VAT Expert Group (VEG)

The VAT Expert Group (VEG) is the formal title applied to a group of people who are appointed having regard to their expertise and knowledge in VAT. The genesis of the VEG is to be found in the Commission's Communication on the future of VAT – Towards a simpler, more robust and efficient VAT system tailored to the single market adopted on 6 December 2011.

The VEG is set-up under the authority of Commission Decision 2012/C 188/02 and was initially formed in September 2012 following a request for people willing to provide their time to this group.

The tasks of the group are to advise the Commission on the preparation of new legislative acts and on policy initiatives relating to VAT and provide insight into the practical implementation of VAT provisions

The group is a mixture of individuals and organisations with an expertise in VAT who serve for a period of 2 years. A new group of individuals were appointed by the Director-General for Taxation and Customs Union as from 1st October 2014. The current group comprises 34 organisation representatives and 12 individuals appointed in a personal capacity.

The group has met 11 times and has published views on matters which include, passenger transport, the place of supply of B2B goods and views on recent CJEU decisions including Wellmory and Skandia.

The views of the VEG have no legal status but they assist the European Commission on VAT matters. The minutes of the group's meetings are published on the Commission's website.